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No. 73-740

In the
Supreme Court of the United States
NOVEMBER TERM, 1973

CHICAGO & SUBURBAN REFUSE DISPOSAL ASSOCIATION, Et Al.,
Petitioners,

vs.

A. CHERNEY DISPOSAL CO. And O. Z. MILLER, LTD.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I. SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is misleading in three significant respects. First, petitioners suggest that the complaint and supporting affidavits merely charged local acts of unfair competition. In fact, a principal element is the charge that the defendant scavenger companies conspired with defendant Leach Co., a Wisconsin manufacturer of truck bodies, with the intent and purpose of precluding plaintiffs from purchasing such truck bodies in interstate commerce. (App. 18-19, 205-206.)

Second, petitioners neglect their own admission that the scavenger business in the Chicago Metropolitan area involves significant traffic across the Indiana state line for both pick-ups and disposals of refuse—some of which had a commercial value and was sold upon transportation across the line. (App. 210-211, 217, and 234-235.)

Finally, petitioners baldly assert that the officers of respondents had no personal knowledge of these interstate aspects of the conspiracy and the business. The affidavits filed herein demonstrate the impropriety of that assertion.

II. REASONS FOR DENYING THE WRIT.

A. The Decision Below Neither Creates a New Test of Commerce Clause Jurisdiction in Sherman Act Cases Nor Conflicts with The Holdings of Either This Court or Any of The Circuit Courts of Appeal.

Petitioners' assertions that the decision below creates a new test and is in conflict with the Ninth Circuit's opinion in *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) are founded on a total misconstruction of the opinion.

The decision is based on the well-settled doctrine that activity having a substantial effect upon interstate commerce is within the jurisdictional reach of the Sherman Act. The court very clearly stated that without a hearing on the factual disputes underlying the jurisdictional issue it could not be determined whether

> ". . . the alleged conduct sought to be regulated had or did not have a 'substantial'—(or 'appreciable') 'economic effect' upon interstate commerce, or 'has a real and substantial relation to the national interest." [*A. Cherney Disposal Co.* v. *Chicago & Sub. Refuse Dis. Ass'n.*, 484 F.2d 751, 758 (7th Cir., 1973)]

Petitioners' argument that a new test of Sherman Act subject matter jurisdiction was created is based upon the following language in the opinion:

> "In essence, the test is whether '[t]he facts of the particular situation . . . determine . . . [that the] relationship to interstate commerce is too tenuous in a practical sense to warrant federal control.'" [*Cherney*, supra, at 759.]

This language was taken from the opinion of the Court of Appeals for the Ninth Circuit in *Rasmussen* v. *American Dairy Ass'n.*, 472 F.2d 517, 524 (9th Cir. 1973), and comes originally from an article by Robert Stern in the Harvard Law Review. (See Stern, *The Commerce Clause and the National Economy*, 1933-1946 (Part 1), 59 Harv. L. Rev. 645, 673 (1946). In the opinion below, as in the opinion of the *Rasmussen* court and in the Stern article, this language was not put forward as a new and distinct test of commerce clause jurisdiction, but rather to emphasize that interpretation of the commerce power involves a practical case-by-case inquiry, not a technical exercise in logical inference. That is the holding of this court. *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 546-547 (1944).

The petitioners' claim that there is a conflict between the decision below and that of the Ninth Circuit in *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) wholly ignores the language and reasoning of the Court of Appeals. Rather than declining to follow *Sun Valley*, as the petitioners allege, the court noted important distinctions between *Sun Valley* and the instant case. *Sun Valley* was an action by the operator of a garbage pickup and disposal service and container leasing service against a competitor who obtained an exclusive franchise for garbage pickup and disposal in an unincorporated area of Clark County, Nevada. In the district court, the plaintiff alleged that defendant obtained the contract as a result of a conspiracy between it and certain county officers contrary to the Sherman Act. The district court entered summary judgment for the defendant. The Ninth Circuit affirmed. Two members of the panel held that defendant's actions were authorized

by the Nevada legislature and that in any case, defendant's "wholly local garbage disposal . . . business" did not become interstate commerce merely because the plaintiff "[s]upplied this business with equipment from out of state." [472 F.2d, at 343]. Judge Browning specially concurred on the ground that the record showed no genuine issue of fact material to whether defendant committed the claimed Sherman Act violations. [472 F.2d, at 344.]

The seventh circuit noted the superficial similarities between *Sun Valley* and present suit, but pointed out that the plaintiffs here, unlike the plaintiff in *Sun Valley*, alleged a conspiracy between defendants and out-of-state manufacturers to cut off the interstate flow of equipment to plaintiffs:

> "[W]hile the mere existence of an appreciable but minute interstate flow of supplies (as in *Sun Valley, Lieberthal, Page and Marks Food*) may not be sufficient to establish jurisdiction, when there is added some appreciable interstate flow to the charge that a conspiracy existed between defendants and manufacturers *located outside of the state,* to block that flow, then a direct restraint on interstate commerce exists, and is actionable under the Sherman Act, Sec. 1 (App. at 205-6, 266, 272). *Klors* v. *Broadway-Hale Stores,* 359 U.S. 207, 210, and 211; *Standard Oil Co.* v. *United States,* 221 U.S. 1." (Court's emphasis.) [*Cherney,* supra., at 756.]

Petitioners also urge that the court below erroneously relied upon cases decided in light of the full breadth of constitutional power of Congress under the commerce clause. Petitioners are apparently under the misapprehension that the Sherman Act represents a limited exercise of the commerce power. To the contrary, however, this

Court held in *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 558-559 (1943):

> "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements. . . ."

B. The Opinion Does Not Establish a Presumption of Jurisdiction Based Upon Allegations in the Complaint and Does Not Place Upon Defendants the Burden of Disproving Jurisdiction.

Petitioners argue that the Seventh Circuit improperly shifted to the defendants the burden of disproving jurisdiction by in effect holding that jurisdiction would be presumed. They point first to a quotation in the opinion from *Rasmussen* v. *American Dairy Association*, supra, that there should be no dismissal for lack of subject matter jurisdiction "'[u]nless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.'" [*Cherney*, supra., at 759.] But on its face this language describes the jurisdictional showing the plaintiff is required to make; it does not move the burden to the defendants or set up any presumption.

Second, the petitioners say that the following statements by the court below in effect permit the plaintiffs to overcome the defendants' challenge to jurisdiction on the basis of their pleadings alone, contrary to the holding of this Court in *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189-189 (1936) that he must justify his jurisdictional allegations by a preponderance of the evidence:

> Unlike the rule governing us on the usual appeal, where we are required to look with favor on all evidence supporting the decision of the trier of fact,

> we must here carefully and favorably consider all evidence tendered in support of the plaintiffs' asserted cause of action, to determine if under any possible theory they have plead facts sufficient to entitle them to avoid a motion for summary judgment, or a motion to dismiss for lack of jurisdiction. [*Cherney*, supra., at 759-760.]

Obviously, the Court of Appeals did not hold that the unsupported allegations of the complaint are sufficient to resist a jurisdictional challenge but rather that when the question is decided on a motion to dismiss for lack of jurisdiction or for summary judgment, the appellate court will scrutinize the evidentiary basis of the trial court's decision more carefully than it would in other circumstances. In fact the Court of Appeals decided that there existed a genuine issue of fact material to the jurisdictional issue and that it was error to dismiss the action without first resolving the factual dispute.

C. There Is No Confusion Among the Lower Federal Courts Respecting the Procedure for Challenging Subject Matter Jurisdiction in Sherman Act Cases.

The defendants ask alternatively that a writ of certiorari be granted in the exercise of this Court's supervisory powers over the lower federal courts, claiming that there is confusion as to the proper procedure for resolving challenges to subject matter jurisdiction in Sherman Act cases. They attempt to bolster their allegations of confusion with citations to cases handling jurisdictional disputes in different ways, some considering the matter in a bifurcated trial (*Mailand* v. *Powerine Oil Co.*, ...F.Supp. ....., 1973 Trade Cases ¶74, 472 (C.D. Calif. 1972)), others holding that an evidentiary hearing is not necessary, (*Tanzymore* v. *Bethlehem Steel Corp.*, 457 F.2d 1320,

1323-24 (3rd Cir. 1972)), and still others taking the issue up on a motion for summary judgment (*John Kalin Funeral Home, Inc.*, v. *Fultz*, 313 F.Supp. 435, 436 (W.D. Wash. 1970), *aff'd per curiam*, 442 F.2d 1342 (9th Cir. 1971), *cert. denied*, 404 U.S. 881 (1971)).

The 'confusion' is illusory. The varied procedures adopted merely reflect the different situations in which the jurisdictional challenge was presented and the consequent need for procedural flexibility to ensure the expeditious and fair resolution of such disputes. In *Gibbs* v. *Buck*, 307 U.S. 66, 71-72, this court held:

> "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." [See also *cf. McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) and *Opelika Nursing Home, Inc.* v. *Richardson*, 448 F.2d 658, 667 (5th Cir. 1971) 1.]

CONCLUSION

For the reasons stated, the Petition for Certiorari should be denied.

Respectfully submitted,

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